IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

STATE EX REL. RYAN FERGUSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 11AC-CC00068
	)	
DAVE DORMIRE, Warden,	)	
Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Procedural Background

1. On February 14, 2011, the Petitioner filed his petition for writ of habeas corpus pursuant to Rule 91.

2. On July 22, 2011, this Court dismissed Claim 4 of the petition after briefing by the parties.

3. Following various pretrial proceedings, the Court held a hearing beginning on April 16, 2012, lasting five days and concluding on April 20, 2012.[1] Petitioner appeared in person and by counsel, Ms. Kathleen Zellner and Mr. Douglas Johnson. Members of the Missouri Attorney General's Office represented Respondent Dormire.

4. This Court takes judicial notice of the underlying Boone County Circuit Court files, including the records on appeal. The appellate record was submitted to the

[1] The Brobdingnagian record in this case consists of over seven file boxes of Pleadings, exhibits, affidavits, transcripts, a video record of the original jury trial, two Western District Court of Appeals files and the resulting Opinions. Additionally this Court held a five day hearing wherein it heard the testimony of the witnesses and legal argument of the parties.

Court as Respondent's Exhibits A through M. The Factual Background section of the Opinion in *Ryan Ferguson v. State of Missouri*, WD 71264, provide as fair and accurate summarization of the evidence at trial which this Court adopts and need not be set forth again here.

5. At the request of the parties, the Court allowed the parties until June 15, 2012, to file proposed findings of fact and conclusions of law.

6. With regard to Claim 4, the allegation that the Lincoln County jury selection process did not comport with Missouri statute, this Court seriously considered that claim in light of *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010).

7. Petitioner's conviction has been affirmed on direct appeal. *State v. Ferguson*, 229 S.W.3d 612, 614 (Mo. App. W.D. 2007). Petitioner then filed a habeas petition challenging the jury selection process, and this Court denied that petition. Ferguson v. State, No. 08AC-CC00721. The Court of Appeals and the Missouri Supreme Court also denied similar petitions. In re Ferguson v. Dormire, W.D. 70818; State ex rel. *Ferguson v. Dormire*, SC90095.

In these state habeas petitions, Petitioner received a ruling from the courts, including the Missouri Supreme Court, that Lincoln County's noncompliance with the statutes did not warrant state habeas relief. Accordingly, the matter could not be reconsidered in the present petition.

8. The Missouri Court of Appeals also affirmed the denial of post-conviction relief, brought under Rule 29.15. *Ferguson v. State*, 325 S.W.3d 400 (Mo. App. W.D. 2010).

9. Petitioner categorizes his claims as follows:

a. Claim 1 asserts actual innocence because:

(1) Jerry Trump recanted;

(2) Charles Erickson recanted (although his "recantation" at the time of the petition was significantly different from his recantation at tbe April 2012 hearing); and

(3) Mike Boyd committed the murder;

b. Claim 2 asserts the prosecutor knowingly used perjured testimony; and

c. Claim 3 asserts Brady violations.

Burden of Proof and Relevant Case Law

10. With Claim 1, Petitioner bears the burden of proving actual innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). He must show clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the judgment. Id. at 548.

11. With regard to Claims 2 and 3, petitioner may only overcome his procedural default of failing to raise those claims on direct appeal in a Rule 24.035 or Rule 29.15 motion, by showing it is more likely than not that no reasonable juror would find him guilty in light of the "new evidence of innocence." Murray v. Carrier, 477 U.S. 478, 496 (1986).

12. "[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific

evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

13. Under Schlup, in order for evidence to be classified as new, it must be evidence "that was not available at trial." *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010) quoting *Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004). If a habeas petitioner adduces conflicting evidence about the murder, the new conflicting evidence is insufficient to show probable innocence. "The existence of such a 'swearing match' would not establish that no reasonable juror would have credited the testimony of the prosecution witnesses and found [that petitioner] guilty beyond a reasonable doubt." *Moore-El v. Luebbers*, 446 F.3d 890, 902-903 (8th Cir. 2006); *Johnson v. Norris*, 170 F.3d 816, 818-819 (8th Cir. 1999)(reversing grant of habeas relief, finding that much of the evidence -- witnesses' memory loss and potentially conflicting testimony of witnesses -- is not new and reliable); *Gomez v. Jaimet*, 350 F.3d 673, 679-681 (7th Cir. 2003)(holding that petitioner's own statements and statements of petitioner's co-defendants were insufficient to warrant applying the extremely rare actual innocence exception); *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005)(rejecting claim where new evidence consisted only of testimony from four relatives of petitioner). Merely putting a different spin on evidence that was presented to the jury does not satisfy the Schlup requirement. *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996).

14. Defaulted claims can be considered in a state habeas petition but only in limited circumstances:

> A person who has suffered criminal conviction is bound to raise all challenges thereto timely and in accordance with the procedures established for that purpose. To allow otherwise would result in a chaos of review unlimited in time, scope, and expense. In accordance with our previous decisions, habeas corpus is not a substitute for appeal or post-conviction proceedings. Habeas corpus may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies only to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results.

State ex rel. Simmons v. White, 866 S.W.2d 443, 446 (Mo. banc 1993).

Habeas review is not meant to be a substitute for post-conviction review under Rule 24.035 or Rule 29.15 or for direct appeal. *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004). To challenge the validity of a conviction through habeas, a petitioner must: 1) demonstrate the existence of a jurisdictional defect; 2) show that he is probably actually innocent; or 3) demonstrate cause and prejudice for the failure to make the claim on direct appeal or post-conviction review. *Green*, 131 S.W.3d at 805, n. 5.

15. Not only must Petitioner establish cause to overcome the default, but he must also show the equivalent of "Brady prejudice." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011).

16. Petitioner alludes to, and the Amicus directly cites, *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003), for the proposition that once he established that Mr. Erickson and Mr. Trump recanted, he is automatically entitled to habeas relief. In

other words, though Petitioner asked for, and received, a five-day evidentiary hearing before this Court (Petition, p. 80), Petitioner (by Amicus) asserts this Court has no obligation to evaluate the strength or weight of his evidence before ordering the extraordinary remedy of invalidating a jury's verdict that has been affirmed on appeal by two separate panels of the Western District.

Circuit courts receive and review evidence as the finder of fact. This Court does not believe that it can, or should, abrogate that responsibility to evaluate the evidence presented. If evidence is not credible, it should not be the basis for habeas relief. And *Amrine* clearly states that the Petitioner has the burden of proof to establish his claims. 102 S.W.3d at 548.

Furthermore, the law views recantations with suspicion. *State v. Cook*, 339 S.W.3d 523 (Mo. App. E.D. 2011); *Haouari v. United States*, 510 F.3d 350, 353 (2nd Cir. 2007) (collecting cases). "[I]f the trial court is not satisfied that a witness's post-trial testimony is credible, it is the trial court's duty to deny a new trial." *State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. W.D. 1998). "Recanting testimony is exceedingly unreliable and regarded with suspicion; it is the right and duty of the court to deny a new trial where it is not satisfied such testimony is true." *State v. Harris*, 428 S.W.2d 497, 501 (Mo. banc 1968). In *Dobbert v. Wainwright*, 468 U.S. 1231 (1984), Justice Brennan wrote that the initial question a reviewing judge should have with a recantation is whether it is true. Only after determining that it is true should the court consider whether the recantation is material. Id. at 1233-34 (Brennan, J. dissenting). A witness who was involved in the

crime may come forward to recant for a variety of base motives or importunities. *Newman v. United States*, 238 F.2d 861, 862 (5th Cir. 1956).

In addition, while not binding, this Court finds the analysis in *Case v. Hatch*, 183 P.3d 905 (NM 2008) to be very perceptive for its logic that a recantation must be credible and the recanted testimony was significant to the original verdict.

This Court will also note that there are some very basic credibility issues present in this matter, as most aptly detailed in MAI-CR 3.02.01.

> In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

17. Additionally, there are allegations raised by Petitioner that can be properly addressed only by a court. Allegations of suborning perjury and withholding evidence are not matters for a petit jury to resolve. It is for a court, not a jury, to address and resolve claims of prosecutorial misconduct.

18. At the April 2012 hearing, Petitioner did not testify, but he presented the testimony of several witnesses.

19. Dr. Larry Blum is a forensic pathologist in Rockford, Illinois. (H. Tr. 121). Petitioner made no showing that this witness was unavailable in 2005, and fails to explain why this witness could not have been called at Petitioner's trial. (H. Tr. 140). After listening to Dr. Blum's opinions, the Court concludes that his testimony and opinions

could have been rendered in 2005 and this is not new evidence. As the State has noted, this proceeding is not intended to be a successive post-conviction proceeding to challenge the effective assistance of counsel. Even if such a claim were permitted, Petitioner did not call his trial attorney, Charles Rogers, and did not overcome the presumption that the decision to not call Dr. Blum, or some similar expert, was a matter of sound trial strategy. Strickland v. Washington, 466 U.S. 668 (1984).

As an example, Dr. Blum testified that Dr. Adelstein was not board certified in forensic pathology. (H. Tr. 129). That is a fact that existed in 2005 and could have been a basis of attack. Dr. Blum did not disagree with much of what Dr. Adelstein concluded ("it was a good report"), but complains that he did not memorialize the details that Dr. Blum would have liked to have seen. (H. Tr. 130-132).

Dr. Blum disagreed with the conclusion that the injuries to Mr. Heitholt's hands were due, in part, to scraping on the asphalt and suggested they were defensive injuries. (H. Tr. 132). It is understandable that defense counsel did not want to highlight the violence and length of the assault, seeing as how Petitioner was charged with first degree murder.

Dr. Blum agrees completely with Dr. Adelstein's conclusion that the cause of death was strangulation. (H. Tr. 135, 136). He also agreed that a belt was used to strangle the victim. (H. Tr. 135). He offers the opinion, however, that this strangulation by the belt did not cause damage to the hyoid bone. (H. Tr. 136). He thinks it is possible that the injury was caused by force. (H. Tr. 135-136, 138). Dr. Blum cannot disagree with Dr. Adelstein's belief that the assailant may have heen kneeling on Mr. Heitholt. (H. Tr. 143,

144). He then tried to suggest some of the injuries were not from a tire tool, as he understands them, but suggested that it was caused by a nail puller. (H. Tr. 144). He produced one during his testimony. (H. Tr. 148). While the Court overruled the State's objection to Dr. Blum's testimony on this matter, it was clearly speculation on his part. (H. Tr. 148). The nail puller produced could not have caused all of the injuries to Mr. Heitholt.

Dr. Blum has "an opinion" about the length of time that he thinks the crime took. He concludes the blunt force took 4-5 minutes, and the strangulation took 2-3 minutes. (H. Tr. 154). He also said it would be impossible to determine the sequence of the injuries. (H. Tr. 155, 156). Dr. Blum also admitted that the strangulation can be shorter due to injuries from the beating of Mr. Heitholt. (H. Tr. 154).

Dr. Blum was asked if he had an opinion about whether Mr. Heitholt was on his knees. Dr. Blum testified he did have an opinion, but he did not state what that opinion was. (H. Tr. 157).

Dr. Blum does not eliminate the possibility that some of the strikes occurred after the strangulation. (H. Tr. 158). He also admitted there are other possible scenarios for the sequence of wounds and how they were struck. (H. Tr. 158-159, 160-161). Dr. Blum also admitted that there were many types of instruments, differing in length and appendages, that could have caused the injuries. (H. Tr. 162).

In fact, on cross-examination Dr. Blum admitted the device he had earlier claimed may have caused the injuries (the nail puller), could not have caused the circular injuries to Mr. Heitholt's head. (H. Tr. 165, 166). Dr. Blum testified that he would have likely

rendered these same opinions in 2005. (H. Tr. 168). His opinion was based on the photos, Dr. Adelstein's testimony, and Dr. Adelstein's report, information available in 2005. (H. Tr. 168, 172-173). Again, there is no reason this attack on the State's case could not have been made by Petitioner in 2005.

Dr. Blum does agree that it is possible the hyoid bone fracture was from the belt. The pressure to cause the hyoid bone to break could have occurred very fast. He mentioned that there are also many factors that influence the amount of pressure needed to break the bone, including age, gender and individual differences. (H. Tr. 169-170, 175-178).

Dr. Blum stated that "overall" the report of Dr. Adelstein was "good" (H. Tr. 178), although he says he wishes it contained more information. Dr. Blum also admitted that even the small nail puller he used as a demonstration could cause a skull fracture. (H. Tr. 181).

While Petitioner proclaimed that Dr. Blum was much better qualified than Dr. Adelstein, in the end, Dr. Blum had very few actual opinions different from Dr. Adelstein, and his differing opinions were speculative. In the end, Dr. Blum contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

20. Joseph Buckley, President of John Reid and Associates, testified critically of the Columbia Police Department's interview of Mr. Erickson on March 10, 2004. (H. Tr. 65-95). This information came to the jury's attention at Petitioner's 2005 trial through cross-examination. (H. Tr. 95). It is not "new evidence" in the factual or legal sense of the term. Mr. Buckley highlighted the non-public information that Mr. Erickson provided

about the offenses. (H. Tr. 97-103, 105). Mr. Buckley also believed that he may have been contacted by the defense about testifying in this very case, further refuting the claim that this is "new evidence." Indeed, Mr. Rogers testified at the post-conviction proceeding that he had consulted with someone about police interview tactics but decided not to use the witness. (Exhibit G, pp. 437, 438). Again, in the end, Joseph Buckley contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

21. Mr. Michael Boyd is a sports editor in Ste. Genevieve. (H. Tr. 504). In 2001, he worked at the Columbia Tribune with Kent Heitholt. (H. Tr. 504). He arrived at the Tribune about 9:00 p.m. on the evening of October 31, 2001. (H. Tr. 504-505, 535). He testified he left about 2:00 a.m. (H. Tr. 505-506, 536). He spoke to Mike Henry "a good few minutes." (H. Tr. 506, 537). Mr. Boyd owned two cars, a red car and a blue car. (H. Tr. 508, 532-533). He drove the red car that night. (H. Tr. 508, 534). He got in his car and listened to music for a few minutes. (H. Tr. 509). He saw Mr. Heitholt exit the building and Mr. Boyd pulled up to his car and spoke to Mr. Heitholt. (H. Tr. 509-510). The conversation lasted "a few minutes."(H. Tr. 512).

When he turned to leave, he saw two people in an alley by the dumpster. (H. Tr. 513-514, 540). He looked in his rear view mirror and Mr. Heitholt appeared to be getting into his car. (H. Tr. 514, 539). Mr. Boyd did not pay attention to the race of the two individuals, or even their gender. (H. Tr. 514-515). He estimates that it was around 2:20 a.m. when he left, "somewhere in there." (H. Tr. 515, 538-539).

After going home and going to bed, Mr. Boyd received a telephone call from a co-worker who told him that Mr. Heitholt had been hurt. (H. Tr. 517-518). A police officer then got on the phone and Mr. Boyd spoke to him. (H. Tr. 518). Mr. Boyd then dressed and returned to the Tribune. (H. Tr. 519-520). There were many police vehicles, and Mr. Heitholt's body was still present. (H. Tr. 520-521).

Mr. Boyd testified that after the arrest of Petitioner and Mr. Erickson, he thought he went to the police and told Detective Short that he saw two individuals in the alley. (H. Tr. 524-525). He had read in the paper that two people were seen in the area and so that prompted Mr. Boyd to go back. (H. Tr. 525). He thought it was within a year and before he moved to Ste. Genevieve. (H. Tr. 526).

In 2005, Mr. Boyd told Mr. Haws the same information. (H. Tr. 526). He also spoke to Prosecutor Crane on the telephone prior to trial. (H. Tr. 527). Mr. Crane did not tell Mr. Boyd whether Mr. Boyd would or would not be a witness. (H. Tr. 528). Mr. Boyd testified that he remembers that the music was very loud outside and he believed it was coming from the nightclub. (H. Tr. 531).

Mr. Boyd did not have any particular reason that night to be aware of the time. He is not sure about what time he left. He did not consider it unusual to see the two individuals in the alley. (H. Tr. 531-532). Again, in the end, Mr. Boyd's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

22. Kevin Crane[2], the prosecutor at Petitioner's 2005 trial and currently a circuit judge, also testified. (H. Tr. 556-557). Mr. Erickson and Mr. Erickson's attorney entered into a plea agreement that required Mr. Erickson to testify truthfully at Petitioner's trial. (H. Tr. 558). Mr. Crane did not suggest or threaten Mr. Erickson that Mr. Crane might consider seeking capital punishment or even charge Mr. Erickson with first degree murder. (H. Tr. 558, 559-560, 586-588). Capital punishment was not an available punishment for those who kill when they were the age of 17. (H. Tr. 559). Nor did Mr. Crane threaten Mr. Erickson with the possibility that Petitioner may make a deal against Mr. Erickson. (H. Tr. 578).

Mr. Erickson entered his guilty plea on November 4, 2004 (H. Tr. 561), long after Mr. Crane spoke with Mr. Trump for the first time on December 21, 2004 (H. Tr. 562-565). On November 4, 2004, Mr. Trump had not identified Mr. Erickson or Petitioner as the men in the parking lot at the newspaper building. (H. Tr. 563; Exhibit R72, p. 4).

At the December 21, 2004 meeting between Mr. Crane, Mr. Haws, and Mr. Trump, Mr. Trump volunteered that be might be able to identify the men in the parking lot. (H. Tr. 567). Mr. Trump stated that he received an envelope from his wife that contained a newspaper story. (H. Tr. 568). Mr. Trump repeated this information at the pretrial deposition. (H. Tr. 572). Mr. Crane recognized that this information would lead to difficulty in admitting into evidence the basis of the identification. (H. Tr. 569). It would

[2] Although now a member of the judiciary, this Judgment will refer to The Honorable Kevin Crane as "Mr. Crane" since at the time of the jury trial he was the Boone County Prosecuting Attorney.

have been easier if there had been an identification after a photo or in-person lineup. (H. Tr. 570, 575).

Mr. Crane attempted to have Mr. Trump identify Petitioner at the August 29, 2005 hearing, but the trial court denied the request. (H. Tr. 572-577). Because Mr. Crane did not know if Mr. Trump would identify Petitioner, it was not foreshadowed in the opening statement. (H. Tr. 579-580). The identification first occurred at trial. (H. Tr. 582). As to Mr. Erickson, Mr. Crane testified that he would not have produced Mr. Erickson as a witness if Mr. Crane thought Mr. Erickson was perjuring himself. (H. Tr. 583).

23. Mr. Jerry Trump[3]: At Petitioner's criminal trial, Mr. Trump identified Petitioner as one of the two men he saw at Mr. Heitholt's car at the time of the murder. (Trial Tr. 1006). Extensive pretrial discovery and hearings established the basis for this identification. On December 21, 2004, after being released from prison on December 13, 2004, Trump met with Kevin Crane and investigator Bill Haws about the upcoming trial of Petitioner. (Trial Tr. 1005).[4]

At this meeting, Mr. Trump announced that his wife had sent him a copy of a newspaper article (Exhibit T4; Exhibit 30 from the trial), dated March 11, 2004 (Exhibit T6) and that he can now positively identify Ryan Ferguson on the night of the murder. Mr. Trump first testified to this fact during his pretrial deposition on June 29, 2005.

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[3] Jerry Trump first appeared in this Habeas proceeding by virtue of a video deposition offered by Petitioner. This Court indicated that it would be beneficial to hear from Mr. Trump in person. The State indicated during a conference in chambers that Mr. Trump was subpoenaed by the State and it would be calling him as a witness during its case in chief. Instead, Petitioner then inexplicably called Mr. Trump live on the second day of the proceeding.

[4] It should be noted that Mr. Trump was not prosecuted for child molestation by Mr. Crane, but was convicted in Audrain County. (H. Tr. 565).

(Exhibit T6, p. 43). He then testified to this fact in a motion hearing outside the presence of the jury on October 18, 2005. (Exhibit T5; Trial Tr. 1000). Finally, he testified to this fact a third time in front of the jury. (Trial Tr. 1021).

Mr. Trump now asserts his earlier testimony was untrue and that Crane suborned his perjured testimony by showing him the newspaper article and "encouraged" him to identify Petitioner. (Exhibit 5, p. 88). Previously, he testified at trial that no such thing had occurred. (Trial Tr. 1002).

Mr. Trump's first affidavit (Exhibit 2) was written on October 11, 2010, the day before Mr. Erickson signed one of his affidavits, on October 12, 2010 (Exhibit 34b). In this first affidavit, Mr. Trump does not state that his in-court identification of Petitioner was inaccurate. Unlike his later testimony at this hearing, however, Mr. Trump then claimed he was able to identify Petitioner because, "I had seen a video that was circulated in the prison that triggered my memory." (Exhibit 2, ¶11). This affidavit states that he has "had the opportunity to reflect upon the events that occurred in the early morning hours of November 1, 2001." (Exhibit 2, ¶5). That statement is not exactly correct because the record demonstrates that Mr. Trump did not simply come to "reflect" upon the events; Petitioner's investigator, Steve Kirby, contacted Mr. Trump and encouraged him to prepare one affidavit and then another.

There are items in the affidavit that cannot reasonably be attributed to Mr. Trump. The most obvious example is in paragraph 8 where Mr. Trump states he told Christine Varner he could not identify anyone; yet, Mr. Trump did not even know who Ms. Varner was. (Trump 2012 depo, pgs. 11, 61, 62).

Though the second affidavit states it was written because Mr. Trump wanted to supplement his first affidavit (Exhibit 3, ¶4), that too is incredible. Mr. Trump testified that he felt no need or desire to prepare a second affidavit. (Trump 2011 depo, p. 68). It was Mr. Kirby who wanted this second affidavit (Trump 2011 depo, p. 63), in which Mr. Trump asserts for the first time that Mr. Crane coerced him into identifying Petitioner as one of the murderers.

The accusations against Mr. Crane by Mr. Trump have increased on every occasion. During his pre-hearing deposition testimony, Mr. Trump claimed that Mr. Crane showed him a newspaper article dated March 11, 2004 (Exhibit T6), and told Mr. Trump the two men were guilty of the murder. At the hearing, Mr. Trump claimed, for the first time, that Mr. Crane suggested that Mr. Trump should state that the newspaper was folded. Earlier, in his second affidavit, Mr. Trump makes no mention of the claim that Mr. Crane suggested the story that Mr. Trump got the newspaper in the mail.

Additional factors undermine Mr. Trump's recantation as to Crane's involvement. The record demonstrates that Mr. Crane was seeking a determination whether Mr. Trump could make an in-court identification of Ryan Ferguson prior to offering his testimony to the jury. Mr. Crane first tried to do so at the hearing on August 29, 2005 (Exhibit C3), but was stymied by the reasonable objections of Petitioner's counsel that Petitioner was wearing jail house clothing. Thus, at the time of trial, Mr. Crane did not know whether Mr. Trump could, or would, identify Petitioner. Mr. Crane did not mention any possible identification by Mr. Trump in his opening statement. (Exhibit C2).

Nonetheless, this Court is convinced that Jerry Trump committed perjury at the initial trial wherein he identified Ryan Ferguson as one of the two individuals he saw outside of the Tribune Building. Whether motivated by a perceived need for a probationer to ingratiate himself to law enforcement, a desire to be in the public limelight, or some other reason known only to him, Trump's identification of Ferguson at trial was false. Mr. Trump's story about his wife sending him a newspaper and this somehow jogging his memory is simply too fantastic to be believed. Indeed, it is the implausible nature of Trump's jury trial testimony that gives weight to the credibleness of the recantation, at least as far as Trump's identification of Petitioner. Trump's initial statements to the Police that he could not provide a detailed description of either of the individuals seen that night is much more believable and this Court finds to be the truth. This Court specifically finds that Kevin Crane had no part in Trump's perjured testimony. In short, the Court finds Mr. Trump's recantation conceming Kevin Crane to be a feeble attempt to both clear his conscience while still attempting to evade responsibility for his perjury. In contrast, the Court finds Mr. Crane's denial of these accusations credible, and his testimony was corroborated by Bill Haws.

However, in order for this recantation to mandate the relief sought by Petitioner, this recantation must also pass the Court's analysis as detailed above and explained below.

24. Charles Erickson: Petitioner asserts that Mr. Erickson's tardy discovery of his amnesia about the events of November 1, 2001, is new evidence of Petitioner's innocence.

Of course, at the time Petitioner filed his petition (February 14, 2011), Mr. Erickson had most certainly not exonerated anyone. On November 22, 2009, Mr. Erickson gave a statement indicating that it was Mr. Erickson who actually strangled Mr. Heitholt, and that Petitioner was present. That explanation showed an intact memory but did not exonerate either man of the murder. On February 9, 2011, Mr. Erickson issued a second recantation in which he never asserts they were not at the murder, but where he says Petitioner did not commit any crime and [Petitioner] did not know of Mr. Erickson's intent to commit a crime. (Exhibit 34d).

Subsequent statements from Mr. Erickson have evolved into a new narrative where Mr. Erickson now claims he has amnesia, has always had amnesia about the events of that night and has no memory about the murder whatsoever. Mr. Erickson's recantations are inconsistent and inherently in conflict with each other. Mr. Erickson even acknowledged that he had told so many different versions of the facts that he does not blame anyone for not believing him today. (H. Tr. 357, 394, 420).

Mr. Erickson testified he was "interested" in the Heitholt murder and read articles about the case. He claimed that the articles in the paper mentioned the fact that the cleaning lady stated one of the suspects asked for help. Yet Petitioner does not demonstrate that the media ever released this particular fact. (Trial Tr. 713, 716). Mr. Erickson stated that because he did not remember what happened that night, he began to wonder if he had committed the murder. Mr. Erickson related the incident on New Year's Eve of 2003-2004, when he talked to Petitioner about whether they were involved in the murder. Mr. Erickson now testifies, "I really did not think I was involved in the murder."

That contradicts his recent recantations. Mr. Erickson said he and Petitioner had a second conversation that Mr. Erickson admitted got loud and heated, and Mr. Erickson said he got in Petitioner's face at one point.

Mr. Erickson acknowledged speaking to Nick Gilpin in March of 2004. Mr. Gilpin is someone with whom Mr. Erickson socialized. Mr. Erickson admits that he "might have" told Mr. Gilpin that he was involved in the murder, and he told Mr. Gilpin that Petitioner strangled Mr. Heitholt and that Mr. Erickson had taken a lesser role in the murder. He admitted hitting Mr. Heitholt and that he told the cleaning lady to go get some help. Mr. Erickson, even when lead by counsel, stated that he was making assumptions when he said these things. Mr. Erickson also had a conversation with Art Figueroa in which he claims he told Mr. Figueroa that Mr. Erickson should have his DNA tested to see if he were involved.

Mr. Erickson testified he was arrested on March 10, 2004, and the video of his later interview with Mr. Nichols was played at the trial. (Exhibit 23). During this interview, Mr. Nichols tells Mr. Erickson not to tell him what Mr. Erickson had read in the newspaper, but to tell him what he remembered. (Exhibit 22). Mr. Erickson was questioned about this interview at trial and stated that he was not intimidated and it did not alter anything he told the police. (Trial Tr. 717, 722-723). This is not new evidence. Nor is the claim that Mr. Erickson was "fed" information a new allegation. Mr. Erickson claims his statement to the police was false and he did it to make himself appear less involved in the murder.

Mr. Erickson's rambling and self-serving narratives during the Habeas hearing are in sharp contrast to the certain and specific testimony Mr. Erickson gave at trial. (Exhibit R66). The trial itself was recorded in the media, and the Court is fortunate to be able to compare the witnesses' (Mr. Trump and Mr. Erickson's) demeanor at trial and at the hearing. This Court finds that Mr. Erickson was testifying truthfully at the jury trial, but is completely fabricating his current stories.

Mr. Erickson's contention that the criminal discovery he received in his case convinced him that he and Petitioner committed the crime is not credible. Erickson's claim that Mr. Trump's identification caused him to admit to a crime he supposedly did not commit are equally not credible. The State introduced Exhibit R72, which is a police report of the interview of Jerry Trump on the morning of the murder. Mr. Erickson testified that he reviewed the discovery and learned that Mr. Trump had identified Petitioner and Mr. Erickson. The police report demonstrates otherwise. It states that Mr. Trump "could not provide a detailed description of either of the individuals." (Exhibit R72). This allegation regarding Mr. Trump is false because Trump admitted that he never told anyone he could identify the killers until after Mr. Erickson had already pleaded guilty.

Mr. Erickson claims he met with Crane and Haws several times and then claims his attorney, Mr. Mark Kempton, was not present at any of these meetings except a proffer meeting with the prosecution. Mr. Kempton testified that this was not true and that he was present at all meetings.

After pleading guilty and being sentenced, Mr. Erickson wrote two letters to Mr. Heitholt's daughter. (Exhibits 25 and 26). In these letters, Mr. Erickson apologizes for the murder.

The first of those letters, dated January 25, 2006, consists of three single spaced handwritten pages and includes with it a two page police report of an interview by the police of Meghan Arthur. The Court notes that the content of the letter appears to be sincere and suggests an honest belief (and memory) that Erickson had committed the robbery and murder of Kent Heitholt, that Petitioner had joined him in committing those crimes, and that he felt remorse for his crimes. Mr. Erickson states in the letter, "I have wanted to apologize to you and your family for some time now. I didn't know how to go about it without seeming intrusive. I too was mad that Judge Hamilton wouldn't let me apologize at the sentencing. I thought that I would never have that chance again." (Exhibit R25).

25. Contrary to Mr. Erickson's current assertion that he has no memory of whether he or the petitioner committed the crimes, the record reflects that Mr. Erickson possessed knowledge of unique facts about the murder. Mr. Erickson knew (1) that the killers had told the cleaning lady to go get help (Exhibit R66a; Trial Tr.712, 713 – Mr. Erickson corrects the defense counsel that this fact had not been in the newspaper); (2) which parking lot at the Columbia Tribune where the murder occurred (Exhibit R57, findings of fact from Petitioner's post conviction proceeding); (3) the location on his body where the victim had been hit; (4) that a man had followed the suspects down the alley (Exhibit R57); (5) the description of the dock at the Tribune (Exhibit R57); (6)

where the cleaning lady had been standing (Exhibit R57); and (7) that the victim's car door was open (Exhibit R57).

26. Mr. Erickson has admitted that before he was arrested he told Nick Gilpin and then later Art Figeroa that he bad hit the victim, that he saw Petitioner strangle the victim and that he told the cleaning lady to go get help (Exhibit R66e, Trial Tr. 860 to 867; and Exhibit R66i, Trial Tr. 893 to 894).

27. Mr. Erickson has described in vivid detail what he observed when he struck the victim with the tool. In one of his first police interviews on video, he tells the detective he "distinctly remembered" the first time he hit the victim, hearing this noise, seeing his face, and it made him sick. When asked by the officer if it was the victim screaming, Mr. Erickson corrects the officer, and says, "No it was more like a groan." (Exhibit R64b).

28. Mr. Erickson gave a statement to personnel at the Department of Corrections upon his arrival to begin serving his sentence that he and Petitioner had in fact committed the crimes for which they had been convicted. In describing what he had done, Mr. Erickson said, "I was drinking with a friend. We decided to do a robbery. Things got out of hand. I hit the guy with a tire tool, my friend strangled him and he was a sports editor for the paper. We didn't get caught for 2 years. It was a high profile case." (Exhibit R47).

29. At the Habeas hearing, Erickson's testimony appears to be that Mr. Erickson just does not remember the events from October 31 to November 1, 2001. But even the August 29, 2011, affidavit shows detailed memories by Mr. Erickson from that

evening. At the Swilling party, Mr. Erickson said he wore bell bottoms, ate candy, played a drinking game with cards, and saw Dallas Mallory (in a police uniform). The police broke up the party, and people fled in panic. Mr. Erickson got a ride from Petitioner because the guys he rode with fled without him. He saw his father when he got home.

Mr. Erickson saw Petitioner's sister looking pretty, dressed in a cat costume, when she got them into By George. Petitioner paid the cover charge and Mr. Erickson had his hand stamped. Mr. Erickson remembered going inside, feeling young and out-of-place. He didn't like the light or music with the costumed people dancing. Because the lights made Mr. Erickson's head hurt, he asked Mr. Igleheart to take him home, but the latter was not ready to leave. These details show detailed memory from the evening. (Exhibit 34a).

30. Under this Court's analysis of this witness credibility, Erickson's testimony at the April 2012 hearing was not credible. Erickson is not an unintelligent person; he was aware of the consequences of his testimony at the original trial and also acutely aware of what his recantation could mean to his own freedom now. Erickson certainly had the opportunity to have seen and heard the things he testified about at the original trial. Any motive for testifying a certain way (memory loss) via the recantation is obvious. The conflict in the two stories is axiomatic. Moreover, the general reasonableness of the prior testimony when compared to the recantation (complete memory loss) weighs overwhelmingly in favor of a factual finding that the recantation is simply not credible. Moreover, the manner in which he testified revealed a rambling, almost incoherent narrative full of inconsistencies and self-serving statements. This Court

specifically finds Erickson's Habeas testimony (recantation) to be false, not credible and untrue.

31. Mr. Baer was a sports writer at the Columbia Tribune on October 31, 2001. (H. Tr. 544). The writers worked late, until 2:00 a.m. in the morning at times. (H. Tr. 544). The computers would shut down at 2:00 a.m. (H. Tr. 545). After Kent Heitholt left, probably after 2:00 a.m., Shawna Ornt came in and said something had happened to Kent. (H. Tr. 546). He and another writer ran out and saw Mr. Heitholt on the ground. (H. Tr. 546-547). They turned him over, face up and had tried to feel for a pulse. (H. Tr. 546-547). They waited for paramedics. (H. Tr. 548). At some point, he called the managing editor and Mike Boyd. (H. Tr. 550). He does not recall if Mr. Heitholt was covered, or when he was covered. (H. Tr. 551). He was not called as a witness at trial. (H. Tr. 553). Again, Mr. Baer's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial.

32. Ms. Kim Bennett testified for the Petitioner. She lived in Columbia and grew up in Columbia. (H. Tr. 460-461). She testified that on October 31, 2001, she and some friends went to By George's club. (H. Tr. 461). She was 16 years old at the time. (H. Tr. 461). She saw Petitioner in By George. (H. Tr. 462). She also knew Mr. Erickson as well. (H. Tr. 463). She was drinking that night, but claims to have had very little to drink – a couple of sips – and was not intoxicated. (H. Tr. 463). She testified the bar closed "around 1:00 a.m.," and people were leaving. (H. Tr. 464). She testified that she saw Mr. Erickson and Petitioner outside the bar and saw them walk "straight" to their car and drive away. (H. Tr. 465-466). Ms. Bennett drew a diagram (Exhibit 47) of where she

claimed Petitioner's car was parked. (H. Tr. 468-469). Her description, however, is inconsistent with the trial testimony of both Mr. Erickson (Tr. 504 – First Street – almost two intersections from the club, 516) and Petitioner (Tr. 1825-1826 – corner of First and Ash). In fact, in this hearing, Mr. Erickson reiterated that Petitioner's car was parked on First Street.

Ms. Bennett testified that several weeks after the March 10 arrest, two officers from the Columbia Police Department appeared at her home and spoke to her. (H. Tr. 470-471). She stated that they asked her questions and that she told them that she saw Petitioner and Mr. Erickson "cross the street" and get into their car and leave. (H. Tr. 471-472). She testified that in 2005, the police again spoke to her about the New Year's Eve party. (H. Tr. 473-474). She testified that she knew nothing about it other than that "they were arguing" and Mr. Erickson was yelling. (H. Tr. 474).

Petitioner's father contacted her after the trial and she eventually contacted him and she told him how she had seen them that night. (H. Tr. 475-476). She credited this contact because several of Petitioner's friends knew her information. (H. Tr. 492-493). She was later contacted by Ms. Zellner's office in December of 2010. (H. Tr. 477). She prepared an affidavit for one of Petitioner's investigators. (H. Tr. 478). She testified she was 100% certain of what she saw. (H. Tr. 479-480).

Ms. Bennett testified she was by the back door of By George's. Mr. Erickson and Petitioner came out the front door. (H. Tr. 484-485). She described Petitioner's car as maroon. (H. Tr. 486). The trial testimony is that car was blue. She also testified that the car was less than a block from where she was standing on the parking lot of By George's.

(H. Tr. 487). Once more, this is inconsistent with Petitioner's own trial testimony. (Tr. 1825-1826). Trial Exhibit 9 was shown to Ms. Bennett, who placed Petitioner's vehicle in a location very different from where the vehicle was described at trial. (H. Tr. 489-491). She acknowledged also that several of Petitioner's friends knew that she had this information. (H. Tr. 492-493). She could not say where Mr. Erickson and Petitioner were at the time of the murder. (H. Tr. 495). While the Court has doubts about the veracity of Ms. Bennett's claim that she told the police this information, her credibility on that issue is not necessary to resolve this claim. Under the prejudice prong of the Brady analysis, this claim is denied. Ms. Bennett's testimony would be inconsistent with the evidence at trial, including Petitioner's own testimony, and would not have been helpful to Petitioner's defense. Again, this testimony, proffered by Petitioner, contributed nothing to the real issue(s) in this matter and her entire testimony is immaterial.

Claim I – The Recantations

33. Both Mr. Erickson and Mr. Trump have recanted their trial testimony. The Petitioner (Amicus primarily) argues that he has no obligation other than to prove that a recantation was made in order to be entitled to relief. This argument fails because of two basic legal principles well-established in Missouri.

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial.

Schlup v. Delo, 513 U.S. 298, 324 (1995) (emphasis added).

Second, "[r]ecanting testimony is exceedingly unreliable and regarded with suspicion; it is the right and duty of the court to deny a new trial where it is not satisfied such testimony is true." *State v. Harris*, 428 S.W.2d 497, 501 (Mo. banc 1968); *State v. Cook,* 339 S.W.3d 523 (Mo. App. E.D. 2011).

A recantation can be sufficient to entitle a petitioner to habeas relief, but not if the recantations are not credible. In this case, Mr. Erickson (and Mr. Trump for that matter) made initial recantations that did not exonerate the Petitioner. Their subsequent recantations, made after considerable consultation with Petitioner's legal team, became more elaborate and more exculpatory – but at least in Erickson's case, less credible. This Court cannot reverse a finding of guilt by a jury, affirmed by two appellate courts, based on a recantation that is not credible.

34. Mr. Erickson claims two reasons for falsely testifying at trial. First, he claims that he was in fear of receiving a death sentence if he did not cooperate with the State. Both Mr. Kempton and Judge Crane testified, credibly, that there were never any discussions of a possible death sentence for Mr. Erickson, nor were there ever any discussions about even amending the charges against Mr. Erickson to murder in the first degree. The Missouri Supreme Court had already ruled, prior to the arrest of Mr. Erickson, that 17-year-old murderers could not be executed. *State ex rel. Simmons v. Roper,* 112 S.W.3d 397 (Mo. banc 2003).

Mr. Erickson's second stated reason for cooperating with the prosecution and implicating Petitioner was because Mr. Jerry Trump had allegedly identified both men. That claim is untrue. Up until the time of the actual trial of Petitioner, and long after Mr.

Erickson had pled guilty, Mr. Trump had not been able to identify anyone. In fact, Mr. Trump was still imprisoned at the time Mr. Erickson plead guilty in November of 2004, and Mr. Trump's recantation does not suggest he made any identification until after Mr. Erickson's plea. No hint of being able to identify anyone was made by Mr. Trump until a month after Mr. Erickson had pled guilty.

35. The testimony of Mr. Erickson's trial attorney, Mark Kempton, is also compelling. Though told by Mr. Erickson of his desire to plead guilty from their first meeting, Mr. Kempton competently and thoroughly represented Mr. Erickson and did not allow Mr. Erickson to plead until Mr. Kempton was certain that Mr. Erickson's confession was both voluntary and true. Mr. Kempton received and analyzed all of the evidence, and communicated those contents to Mr. Erickson. Mr. Kempton proactively addressed any mental health issues and had Mr. Erickson evaluated. Mr. Kempton fully understood his ethical obligations to Mr. Erickson and represented his interests well.

36. The two letters Mr. Erickson wrote to the victim's daughter (Exhibits 25 and 26) also support the conclusion of this Court and the jury that Mr. Erickson's trial testimony in 2005 was true. The letters reflect a genuine remorse that Mr. Erickson now has extinguished.

37. Finally, with regard to Mr. Erickson, the Court believes that Mr. Erickson is now motivated to fabricate these recantations because of a dislike of the realities of prison life along with a hope that his release will occur once he assists in releasing Petitioner. While denials of this motivation were made, the record clearly reflects Mr. Erickson's hope and expectation that he, too, will be released. In the meantime, Mr.

Erickson's time in prison is likely to be lengthened because of the difficulties from other offenders' perception of him as a snitch. This recantation occurred under circumstances that are far, far away from being free from suspicion of undue influence or pressure from any source. Moreover, the record discloses a possibility of collusion (perhaps implied but nonetheless present) between the defendant (or his agent(s)) and this witness between the time of trial and the retraction

38. Mr. Trump's recent recantations suffer from the problem that this Court believes Mr. Trump's various recantations to be both true and false. As will be noted, some of the new assertions made by Mr. Trump are simply improbable and dubious. This Court believes that Jerry Trump did see two teenage white males the night of the murder. However, this Court does NOT believe that Jerry Trump testified truthfully about his positive identification of Ryan Ferguson. Jerry Trump negates his own credibility by falsely accusing Kevin Crane and Bill Hawes as being the source of his perjury.

The evolution of Mr. Trump's recantations developed in the same suspicious manner as Mr. Erickson's. In both cases, Mr. Trump and Mr. Erickson made retractions to Petitioner's attorney that did not exonerate Petitioner. Only after repeated visits from Petitioner's legal staff, and overt prompting, did both of these individuals come to the conclusion that they were both "coerced" into testifying falsely at trial. In October of 2011, Petitioner's investigator, Steve Kirby, visits Mr. Trump on several occasions (by telephone and in person) and finally obtains an affidavit from Mr. Trump recanting his positive, in-court identification of Petitioner. (1st Affidavit). (H. Tr. 35).

Petitioner's investigator makes repeated visits to Mr. Trump and finally gets a new affidavit that comports with the Petitioner's "theme" – prosecutor coercion. (Exhibit 1, p. 69). (H. Tr. 39, 49-50). Mr. Kirby referred to it as "defense collaborating." (H. Tr. 38).

The new affidavit claims that Judge Crane had a nine-month-old newspaper article with him when he interviewed Mr. Trump and showed Mr. Trump pictures of Petitioner and Mr. Erickson. (Exhibit 1, pp. 78, 88). Aside from the fact that Mr. Trump testified three times under oath that he saw the newspaper article in prison when his wife sent it to him (Tr. 1000, 1020-21, 1031), Mr. Trump's factual allegation is not credible.

These events are completely inconsistent with Trump's prior, more reliable, statements to the police the night of the murder. Unfortunately, his recantation has been jumbled together with the claim that Judge Crane coerced Mr. Trump into making an identification on December 21, 2004.

This Habeas Court has had the heretofore rare opportunity to review the entire original trial on video, as well as by transcript. It appears to this Court that at all relevant times, Kevin Crane was especially aware of his special role as a Prosecutor who "has the responsibility of a minister of justice and not simply that of an advocate." It is unknown if Crane believed Trump's positive identification, what is known is that Crane gave the trial court every opportunity to exclude this evidence and even down played it in his closing argument. This Habeas Court expressly finds that while Trump recants truthfully that he could not positively identify Ferguson as an individual he saw the night of the murder. Yet in an effort to avoid prosecution for perjury, Trump attempts to transfer blame onto Kevin Crane and the State. This Court finds that the recantation is accurate as

to the Trump's observations the night of the murder but are false as to the source and rationale behind his original perjury.

39. The credible and unequivocal denial of Mr. Crane that he knowingly used perjured testimony at the jury trial is corroborated by the testimony of Mr. Bill Haws, the prosecutor's investigator who was present during these meetings. Their credibility is bolstered by the facts and circumstances surrounding Mr. Trump's testimony and in-court identification.

40. The 2005 trial testimony of Mr. Erickson is credible. The various inconsistent recantations of Mr. Erickson are not credible. Mr. Trump's recantation is credible in part, but also not credible as to the reason why he committed perjury at the first trial. The recantation of Erickson does not, therefore, constitute new evidence to support a claim of actual innocence. Erickson's recantation is a textbook example of why the law views recantations with suspicion and caution. The recantation of Trump is problematic in that this Court does find he perjured himself at the jury trial but equally perjured himself at the April 2012 habeas hearing by falsely accusing Kevin Crane as the reason and source of bis original perjury. Nonetheless, the Court does not find Trump's recantation affords Petitioner the relief he seeks. Not only must this Court find that the recantation is credible, it must also find clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the judgment. State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003) at 548. If Mr. Trump had testified truthfully at trial, his testimony would have been merely that he saw two teenage white males at the scene and nothing more. This would have been corroborative of Erickson's

testimony. When compared to Erickson's vivid description of the horrific details of the murder, Trump's false positive identification was not material and merely cumulative. This Court is in no way left with a firm belief that but for the perjured testimony the defendant would most likely not have been convicted. Trump's perjured testimony at the jury trial was not a difference-maker.

41. Petitioner abandoned his claim that Mr. Boyd is the actual killer of Mr. Heitholt. The State filed a motion in limine and during a pretrial hearing to address motions filed by both parties; Petitioner indicated he did not intend to proceed with the claim.

42. By agreement with the State, Petitioner was given time to investigate information from Enterprise Car Rental concerning a vehicle owned by Mr. Boyd. Nothing further was submitted and the Court has assumed, based on the fact that Petitioner filed his proposed findings of fact and conclusions of law, that Petitioner had no further evidence to offer as a result of his investigation.

43. Petitioner also asserted he would prove that he and Mr. Erickson could not have committed the murder, relying on the "timeline" established by various witnesses. Petitioner did not sustain his burden. Other than the time in which the Tribune's computers were shut down on the morning of November 1, 2001, and the time of the 911 call to the police, all other times mentioned by witnesses were approximated and do not eliminate Mr. Erickson and Petitioner as the killers.

44. Claim I denied.

Claim II

45. In Claim II, Petitioner asserts that Judge Crane suborned perjury from Mr. Trump. The Petitioner did not merely fail to sustain his burden of proof as to this claim; this Court finds that the claim is untrue. Judge Crane did not encourage Mr. Trump to testify falsely in the trial of Petitioner. There was no knowing use of perjured testimony by Judge Crane. Claim II denied.

Claim III

46. In Claim III, the Petitioner asserts that the testimony of Kim Bennett established a Brady violation. There was also a claim that Mr. Boyd made a statement to police that was not given to the defense. The Court views with caution the recollection of witnesses presented several years after the events. Not unlike a belief in Petitioner's actual innocence, the recollections may be sincerely believed but nevertheless inaccurate. This is one of many reasons why subsequent habeas proceedings based on claims of actual innocence should properly be limited to exceptional circumstances.

47. To show Brady prejudice, the offender must demonstrate a reasonable probability that the outcome of the proceeding would have been different. Id. at 128 quoting Strickler v. Greene, 527 U.S. 263, 280 (1999) quoting United States v. Bagley, 473 U.S. 667, 682 (1995). In Bagley, the Supreme Court stated, "[w]e find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence to the accused: the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 682.

48. As noted above, the testimony of Ms. Bennett would not have benefitted the Petitioner. Her testimony is not credible or persuasive because it directly contradicts the testimony of Petitioner, himself, at trial. If anything, this testimony only highlighted the fact that Petitioner and Mr. Erickson's testimony about the events of that night were strikingly consistent, in spite of any claim that Mr. Erickson "blacked out." Regardless, this testimony would not have changed the outcome at trial.

Nor does the testimony of Mr. Boyd create a timeline that made it impossible for Mr. Erickson and Petitioner to commit the murder.

49. Subsequent to the hearing and prior to filing proposed findings, the Petitioner submitted Exhibits 111, 112, and 112a to this Court. The State indicated it would make no objection to their admission and consideration by the Court.

50. Exhibit 111 is purported to be the Department of Corrections polices for sending and receiving mail, and is dated May 11, 2003. Petitioner appears to argue that this policy somehow casts doubt on Mr. Trump's testimony that he received the Tribune newspaper article (Exhibit T4) from his wife while in prison. The Court finds that Exhibit 111 casts additional doubt on the accuracy of Mr. Trump's original trial testimony. Section III, F., 1.f, states that a letter is limited to 5 additional pieces of paper or clippings. Mr. Trump's testimony at his deposition suggests that his wife's letter with the newspaper article would have been in violation of this policy:

"My wife sent me a copy of the page out of the paper where two had been arrested on suspicion of being the ones that had murdered Kent Heitholt."

(Exhibit T6; June 29, 2005, Trump depo, p. 42).

51. Exhibit 112 is what appears to be an edited news clip from an unknown, and undated, news report. Again, the State did not object to this Court receiving and considering this item for whatever evidentiary value this Court gives it.

In the video clip, Mr. Crane does not say he will seek or even consider the death penalty for Mr. Erickson, but that he will be reviewing and researching the matter.

52. Exhibit 112a is a newspaper article dated March 13, 2004 (which was three days after the arrests), in which the reporter states that Mr. Crane "hasn't decided whether to pursue the death penalty for one of the two suspects ...." The article notes that Mr. Crane discusses the fact that the Missouri Supreme Court had already ruled that 17-year-olds could not be executed, which was consistent with Mr. Crane's testimony at this hearing. It is true that at the hearing, Mr. Crane testified that the death penalty "was never in play" with regard to either suspect. (H. Tr. 558). The Court believes this minor inconsistency is due to the passage of time and memory rather than an attempt to mislead.

More important, these pieces of evidence suggesting that Mr. Crane may have initially considered whether the death penalty was appropriate for Petitioner in no way alters this Court's conclusion that Mr. Erickson was never threatened by Mr. Crane or Mr. Kempton with the death penalty.

Mr. Crane made it clear that Mr. Erickson was never subject to the death penalty (H. Tr. 560), and Mr. Kempton confirmed this fact (H. Tr. 630-631). It is this fact, that Mr. Erickson was never threatened with the death penalty that is relevant to this Court's conclusion that Mr. Erickson's recantations are fabrications completely lacking in credibility.

53. Petitioner also submitted the affidavit of his trial counsel, Charles Rogers, whom Petitioner had indicated was unavailable for the hearing because of a serious injury.

Exhibit 113 is a lengthy affidavit by Mr. Rogers in which he offers opinions about a number of legal matters and reports that there were various items of evidence or information not provided to him prior to the trial. In other words, the affidavit is intended to support Petitioner's new claims of Brady violations.

The State objects to the affidavit, Exhibit 113, because it is hearsay and because the State has not had the opportunity to ask any questions of Mr. Rogers. While the State's objections are both reasonable and proper, this Court overruled the State's objection and received Exhibit 113. The Court does so for one compelling reason, to bring some finality to this case and address all issues.

Petitioner has not actually taken the proper steps to obtain review of his "new" Brady claims, although this Court believed it was clear to Petitioner that a formal motion – setting forth the specific claims Petitioner wished this Court to consider and address – should be filed. Though Petitioner has failed to do so, the Court nevertheless will endeavor to address these claims over the State's objections.

54. As to Petitioner's claim that the State had some obligation to prepare a report and notify the defense every time a witness is contacted, the Petitioner provides no authority to support this proposition. Mr. Haws telephoned Mr. Trump while Mr. Trump was still incarcerated and asked Mr. Trump to contact the prosecutor when released. That telephone call does not mandate a police report being prepared or disclosure of this telephone call to the defense. Yet from this event, it appears that Mr. Rogers now concludes that the State fabricated Mr. Trump's story. This Court finds that Mr. Trump fabricated, Mr. Trump's story, not the State. This is one of several reasons why Mr. Rogers' affidavit is not particularly persuasive. This Court has already addressed the allegation that Mr. Crane had Mr. Trump fabricate his testimony and restates the conclusion that this claim is completely untrue. The telephone call does not, as Mr. Rogers suggests, establish "governmental involvement in the identification." (Exhibit 13, ¶47).

55. Likewise, this Court has already addressed Petitioner's claim that Mr. Boyd's testimony created a timeline that made it impossible for Mr. Erickson and Petitioner to have committed the murder. Unlike Mrs. Trump, who did not appear and testify and whose potential testimony – had she testified – is only a matter of speculation, Michael Boyd did testify at the hearing and it was clear to this Court that Mr. Boyd's times were approximations:

Q. So are you giving your best estimate as to how much time?
A. Pretty much my best estimate, yes.
Q. No reason to be memorizing times that night?
A. Unless it's right in front of me, no.

Q. And when you get out to your car and you're done talking with Kent, you give estimates of your time, but you don't know exactly when?

A. Not exactly, no.

Q. And one police report you gave your best guess; it could have been 2:15 to 2:20?

A. They asked me how you all do and, you know, and I just pretty much guess.

Q. So you're not committing to saying I know for sure I left at exactly 2:20 or 2:15?

A. I know it was close to 2:20, but the exact time, I was not paying attention.

Q. That's based on your best guess based on how long it might have been when you were chit-chatting with people?

A. Fair to say.

(H. Tr. 538-539).

Thus, Mr. Rogers is again incorrect in asserting that Mr. Boyd's testimony creates some timeline that would prove Petitioner innocent. It is abundantly clear that the times given by these witnesses were not intended as exact. Furthermore, according to the Petitioner's theory, if the timeline were true, then Mr. Heitholt would have to have still been alive when Ms. Ornt called the police at 2:26 a.m. – to report he was dead. The timeline advocated by Mr. Rogers and the Petitioner make it impossible for anyone to have strangled or murdered Mr. Heitholt at the time the crime was reported.

The Court does not fault Mr. Rogers for continuing to be an advocate for his client, but the Court does not give great weight to Mr. Rogers' opinions or conclusions. As one example, Mr. Rogers' assertion that, "I would have been able to connect Boyd to the murder as the likely suspect" (Exhibit 113, ¶42), is untrue and incorrect based on the evidence produced at this hearing.

56. Finally, this Court has also addressed Petitioner's allegation that Kimberly Bennett's testimony was new Brady evidence. Mr. Rogers does not say he was unaware of her testimony in his affidavit, only that the prosecution did not provide it to him. (Exhibit 113, ¶17). Ms. Bennett's testimony is inconsistent with the trial testimony of Mr. Erickson and Petitioner. She did not see what she claims and had Mr. Rogers used her as a witness, she would have impeached the credibility of Petitioner.

SUMMARY

Despite voluminous filings and a lengthy hearing, Petitioner's only relevant evidence is the recantations of Erickson and Trump. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) clearly states that:

> The appropriate burden of proof for a habeas claim based upon a freestanding claim of actual innocence... require the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. See Ex parte Joe Rene Elizondo, 947 S.W.2d 202, 205 (Tex.Crim.App.1996); Miller v. Commissioner of Correction, 242 Conn. 745, 700 A.2d 1108, 1132 (1997). The burden of establishing a fact by clear and convincing evidence is heavier than the "preponderance of the evidence" test of ordinary civil cases and is less than the "beyond reasonable doubt" instruction that is given in criminal cases. Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." In re T.S., 925 S.W.2d 486, 488 (Mo.App. E.D.1996).
>
> *Amrine* at 548.

With regard to the recantation of Erickson, Petitioner has not established by clear and convincing evidence that the recantation is true. Far from being left with an abiding conviction that this evidence is true, this Court finds the recantation of Erickson to be not

credible and false. With regard to the recantation of Trump, this Court finds that his recantation is credible and true - as to his falsely identifying Petitioner; but not credible and false as to the reason for his perjury being the actions of Kevin Crane and the State. Even so, this Court finds as a matter of law that Trump's recantation does not undermine this Court's confidence in the correctness of the original jury trial verdict and judgment.

Conclusion

Accordingly, after independent reflection, this Court denies Petitioner's petition for a writ of habeas corpus. Judgment is entered on behalf of Respondent.

SO ORDERED.

10/31/12
Date

The Honorable Daniel R. Green